Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

LIVONIA SHROPSHIRE, individually and as next friend of HANNAH SHROPSHIRE,
Petitioner,

v.

LAIDLAW TRANSIT, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the transfer of the factfinder role from the jury to the judge regarding the seriousness of an injured person's impairments, as established under the Michigan statute at issue in this case, M.C.L. § 500.3135(2)(a), unconstitutional under the Seventh Amendment in cases tried in federal court pursuant to diversity jurisdiction?

Did the Court of Appeals for the Sixth Circuit err by *sua sponte* granting summary judgment under Fed. R. Civ. P. 56(c) regarding the seriousness of the impairments suffered by the five-year-old plaintiff where the court gave no weight to the medical opinions of the child's physicians?

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are Petitioner-Plaintiff Livonia Shropshire, a Michigan resident, as next friend of Hannah Shropshire, a minor, and Respondent-Defendant Laidlaw Transit, Inc., a Delaware corporation. Petitioner Livonia Shropshire asserted claims on her own behalf in the district court, but her individual claims were not at issue in the appeal to the Sixth Circuit.

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The opinion of the United States Court of Appeals for the Sixth Circuit (App. 1a-19a) is published as *Shropshire v. Laidlaw Transit, Inc.*, 550 F.3d 570 (6th Cir. 2008). The transcript of the portion of the hearing where the district court made its findings and conclusions is attached (App. 20a-30a), and the order granting summary judgment issued by the United States District Court for the Eastern District of Michigan (App. 31a-33a) is unpublished. The Appendix also includes the district court order denying reconsideration (App. 34a-36a) and the Sixth Circuit order denying rehearing (App. 37a-38a).

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008, and the order denying the petition for rehearing was entered on February 25, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Because the constitutionality of a Michigan statute is drawn into question in this petition, the provisions of 28 U.S.C. § 2403(b) may apply, and a copy of this petition is being served on the Attorney General of Michigan. The constitutional question involved first arose when the court of appeals ruled *sua sponte* that the Michigan statute at issue conflicts with Fed. R. Civ. P. 56(c). The court of appeals did not address the constitutional issue, and the court of appeals did not certify to the Attorney General of Michigan the fact that the constitutionality of a Michigan statute was drawn into question.

CONSTITUTIONAL PROVISION, STATUTE, AND COURT RULE INVOLVED

Seventh Amendment

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 56(c)

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

M.C.L. § 500.3135

§ 500.3135. Tort liability for noneconomic loss; action for damages pursuant to subsection (1); abolition of tort liability; exceptions; action for damages pursuant to subsection (3)(d); commencement of action; removal; costs; decision as res judicata; "serious impairment of body function" defined.

Sec. 3135. (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

***

(3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:

***

(b) Damages for noneconomic loss as provided and limited in subsections (1) and (2).

***

(7) As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On May 15, 2001, Hannah Shropshire's mother Livonia picked her up at school, along with her two sisters and her brother. Hannah was five years old at that time, nearing the end of kindergarten. Livonia drove a van with three rows of seats and Hannah, wearing a seatbelt, sat in the row immediately behind her mother. After picking up the children Livonia headed towards the parking lot exit, driving alongside a row of school buses parked to her right. As she did so, a bus owned by defendant Laidlaw pulled away from the curb and struck the right rear passenger side of the van. (App.4a).

The accident caused Hannah to hit her head against the van's window. Within a few days, Hannah began to experience headaches, and when, a week after the accident, she also developed a fever and began vomiting, her mother took her to see Dr.

William Heath, her pediatrician. (App. 4a-5a). Dr. Heath was concerned with the severity of Hannah's headaches, and he referred Hannah for evaluation with specialists. Over the course of her treatment, Hannah was evaluated by Dr. Richard Weiss, a neuropsychologist, and by Dr. Charisse Valentine, a neurologist. In addition to supporting medical records and test results, Dr. Heath, Dr. Weiss, and Dr. Valentine each submitted affidavits summarizing their opinions and conclusions regarding Hannah. (App. 39a-47a).

Dr. Heath has been Hannah's pediatrician since birth, and Dr. Heath reported changes in Hannah's emotional and cognitive skills after the accident along with the persistent headaches. (App. 40a). Dr. Heath found that Hannah had shown normal growth and development up until her accident, and Dr. Heath ultimately expressed the opinion that "her present difficulties with her cognitive skills and decreased school performance are the result of the head trauma she sustained in the accident." (App. 41a).

Dr. Weiss performed a complete battery of objective neuropsychological tests as part of his evaluation of Hannah. (App. 42a-43a). Dr. Weiss expressed the opinion that Hannah had suffered a closed head injury in the accident with resulting loss of mental functioning, including memory and visual-spatial deficits, as well as changes in personality and behavior. (App. 43a). Dr. Weiss diagnosed Hannah with posttraumatic brain syndrome and organic personality syndrome as a result of the injuries she suffered in the accident. (App. 43a). Dr. Weiss also expressed the opinion that these conditions could "affect Hannah's ability to work, establish positive

relationships with others, integrate into a productive and healthy adult life, benefit from educational endeavors, and function in a self-sufficient manner." (App. 43a).

Dr. Valentine expressed the opinion that Hannah suffered a traumatic brain injury as a result of the accident. (App. 46a). Dr. Valentine further found that Hannah "manifests seizures attributable to the aforementioned motor vehicle accident and resulting closed head injury," and Dr. Valentine concluded that Hannah's closed head injury was "a serious neurological injury." (App. 47a).

II. DISTRICT COURT PROCEEDINGS

Petitioner initially filed this action in state court in Michigan, and Respondent thereafter removed the case to the United States District Court for the Eastern District of Michigan based on diversity jurisdiction. After discovery, Respondent moved the district court for summary judgment based on application of a Michigan statute, M.C.L. § 500.3135, which limits tort liability for noneconomic loss caused by a motor vehicle accident. In this case, the statute requires Petitioner to show that Hannah suffered a "serious impairment of body function" in order to recover noneconomic damages. M.C.L. § 500.3135(1). The term "serious impairment of body function" is defined under the statute to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." M.C.L. § 500.3135(7).

Most importantly, M.C.L. 500.3135(2)(a) allocates the factfinding role in part to the jury and in part to the court as follows:

> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
>
> (a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
>
> (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. *However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.*

M.C.L. § 500.3135(2)(a) (emphasis added).

Dr. Valentine is a licensed neurologist who regularly treats patients with closed head injuries, and she provided a sworn affidavit declaring that Hannah suffered a "serious neurological injury." (App. 47a) Consequently, Petitioner believed that she had

satisfied the provisions of the last sentence of M.C.L. § 500.3135(2)(a)(ii), thereby creating an automatic jury question and precluding summary judgment with regard to the issue of serious impairment of body function. (App. 26a-27a). However, the district court found that the portion of Dr. Valentine's affidavit declaring that Hannah "manifests seizures attributable to the aforementioned motor vehicle accident" was contradicted by Dr. Valentine's deposition testimony that she did not have documentation of "a definite clinical seizure," apparently presuming that a neurologist cannot diagnose seizure activity without clinical observation of a seizure. (App. 29a).

The district court therefore disregarded Dr. Valentine's sworn affidavit entirely, enabling the court to decide the facts of Hannah's impairment as a matter of law under M.C.L. § 500.3135(2)(a). The district court summarily found that Hannah's impairments were not objectively manifested because "the majority her tests have come back normal," and that Hannah had "continued to live relatively as she lived prior to the accident." (App. 29a). On this basis, the district court granted Respondent's motion for summary judgment as to serious impairment of body function. (App. 29a, 31a-33a).

III. CIRCUIT COURT PROCEEDINGS

The Court of Appeals for the Sixth Circuit invalidated the provisions of M.C.L. § 500.3135(2)(a) upon which the district court rested its decision, concluding that the statute conflicts with Fed. R. Civ. P. 56(c). (App. 7a). The court of appeals first applied the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64,

78 (1938), concluding that the allocation of factfinding authority under M.C.L. § 500.3135(2)(a) is procedural rather than substantive: "It appears from the language of the closed-head injury provision, and, for that matter, subsection (2)(a) as a whole that its purpose is to allocate decision-making authority between the judge and the jury, a quintessentially procedural determination." (App. 9a). The court of appeals found that this subsection is "bereft of substantive law" that potentially could require its application in federal court.. (App. 9a). Determining that the statutory procedures conflict with summary judgment under Rule 56, the court of appeals then determined that the Michigan statute is displaced by Rule 56 in cases litigated in federal court. (App. 9a-14a).

Curiously, when the court of appeals then proceeded to analyze the case under Rule 56, it still relied heavily on the Michigan Supreme Court's guidance in the case of *Kreiner v. Fischer*, 471 Mich. 109; 683 N.W.2d 611 (2004). (App. 15a-16a). *Kreiner* is a case that presumes the validity of M.C.L. § 500.3135(2)(a) and provides guidelines for how the court, rather than the jury, should decide the facts of serious impairment of body function. As the court of appeals noted:

> *The Kreiner* court explained in great detail *how courts should determine* whether an injury affects a person's general ability to lead her life, beginning by noting that:
>
> > [W]hat is "normal" is to be determined subjectively on the basis of the plaintiff's own life and not the life of some objective third party. However, once that is fixed

> as the base, it is to be objectively determined whether the impairment in fact affects the plaintiff's "general ability to lead" that life.

Id. at 619 n.7. The court further clarified the analysis to be undertaken:

> The starting point in analyzing whether an impairment affects a person's "general," i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity.

Id. at 625. In general, *courts should make this determination* based on the totality of the circumstances. *Id. at 626.*

(App. 15a-16a) (emphasis added). In making its Rule 56 determination, the court of appeals declared that:

> We assume without deciding that Dr. Valentine's affidavit is admissible evidence, and as such, it will be treated like all other evidence submitted at this stage of litigation. However, because Dr. Valentine does not opine on any of

> the ultimate factual issues of the case, it is irrelevant to our inquiry.

(App. 15a, n.6). Noting that Hannah's age "makes it difficult to apply *Kreiner* to her case," the court of appeals did not address any of the medical evidence in the record, instead focusing on the testimony of Hannah and her mother. (App. 17a-18a). As the court of appeals viewed the facts, "Hannah's mother had an opportunity to explain exactly how the injury has affected her daughter's academic performance, and her explanation was, in our view, less than compelling." (App. 17a-18a). The court of appeals affirmed the grant of summary judgment on this basis. (App. 19a). Petitioner thereafter filed a petition for rehearing,[1] which was denied by the court of appeals. (App. 37a-38a).

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH AMENDMENT CONTROLS THE PROCEDURAL ANALYSIS IN THIS CASE

It is abundantly clear that this Court needs to address the relationship between Rule 56 and the Seventh Amendment, and in that context the Court should review the Rule 56 analysis of the court of appeals in this case. It seems axiomatic that Rule 56(c) is really more of an exception to the

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[1] Because the validity of the Michigan statute was first raised *sua sponte* by the court of appeals, Petitioner first made her Seventh Amendment argument in the petition for rehearing to the Sixth Circuit.

constitutional dictates of the Seventh Amendment, rather than a free-standing jurisprudential doctrine. The Seventh Amendment establishes the right to a jury trial in civil cases, and the only exception applies to those cases where there is no triable issue of fact as determined according to the procedures of Rule 56. Viewed in this light, the limitations on summary judgment under Rule 56 – the casting of inferences in favor of the nonmoving party and the restrictions against the court weighing evidence or credibility – are not flexible guidelines, but rather rigid requirements that must be enforced with the "utmost care" to protect the rights afforded under the Seventh Amendment.

The court of appeals has engaged in a plain and simple fact determination under the auspices of Rule 56, disregarding admissible medical evidence and weighing credibility to come to its conclusion. If this decision is permitted to stand in this form, it is difficult to imagine a situation where a federal court would be restrained from deciding the facts of a case in a summary judgment proceeding. Therefore, it would be appropriate for the Court to grant the petition for a writ of certiorari in this case.

"The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting, and n.10, quoting 3 The Writings of Thomas Jefferson 71 (Washington ed., 1861): "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held

to the principles of its constitution."). This principle clearly should control this case.

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." As this Court has long recognized:

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), ". . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. *Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.*

Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935). The Seventh Amendment applies not only to common-law causes of action, but also to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law

courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 42 (1989). The present case involves a statutory tort claim for money damages under M.C. L. § 500.3135, and there can be no doubt that it falls within the ambit of the Seventh Amendment.

It is equally clear that the legislature is not empowered to override the jury simply by designating a type of case as something for the court to decide without a jury. Perhaps the best explication of this principle is contained in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). The *Feltner* court confronted a copyright statute that placed the determination of statutory damages in the hands of the court. *Id.*, at 345-46. After determining that copyright cases historically have been tried to juries, the Court further explained that the right to a jury trial "includes the right to have a jury determine the amount of damages." *Id.*, at 353, Therefore, despite a statutory grant of this authority to "the court," the statute yielded to the overriding requirements of the Seventh Amendment in order "to preserve the substance of the common-law right of trial by jury." *Id.*, at 355, quoting *Tull v. United States*, 481 U.S. 412, 426 (1987).

This is not a new concept:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and

> jury and, under the influence -- if not the command -- of the *Seventh Amendment*, assigns the decisions of disputed questions of fact to the jury. The policy of uniform enforcement of state-created rights and obligations, cannot in every case exact compliance with a state rule -- not bound up with rights and obligations -- which disrupts the federal system of allocating functions between judge and jury. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 537-38 (1958) (internal citations omitted). The Byrd court had no trouble disregarding the commands of the state statute that conflicted with the Seventh Amendment because "there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Id.*, at 538. In summary, where a state statute transfers factfinding authority from the jury to the judge, the statute conflicts with the Seventh Amendment and is to be disregarded in federal court proceedings.

A. The Sixth Circuit decision is tantamount to a determination that the Michigan Statute is unconstitutional

The Sixth Circuit decision in this case expressly follows the *Byrd* analysis with one vital distinction – rather than viewing the Michigan statute in conflict

with the Seventh Amendment, the court of appeals views it as a conflict with Rule 56. (App. 8a-10a). Indeed, despite basing its analysis on the *Byrd* holding, the court of appeals decision does not even mention the Seventh Amendment. Nevertheless, to the extent that M.C.L. § 500.3135(2)(a) conflicts procedurally with federal law,[2] the federal law it conflicts with is the Seventh Amendment. This is significant because of the edict that any curtailment of the Seventh Amendment right to a jury trial "should be scrutinized with the utmost care." *Dimick*, supra, at 486. By viewing the conflict solely in terms of Rule 56, however, the court of appeals empowered itself to decide the case without addressing the jury trial question. Indeed, after deciding that the Michigan statutory provision was inapplicable in federal court, the court of appeals still followed the analytical framework laid out by the Michigan Supreme Court as to "how courts should determine" the facts of serious impairment under the statute. (App. 15a-18a), applying *Kreiner v. Fischer*, 471 Mich. 109; 131-34, 683 N.W.2d 611, 625-26 (2004), under the guise of Rule 56.

There can be no doubt that the analysis of "serious impairment of body function" under the Michigan statute requires a factual inquiry despite the fact that the statute requires the court to decide the issue "as a matter of law." M.C.L. § 500.3135(2)(a). When prescribing the method for courts to make such decisions, the Michigan Supreme Court distinguished

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[2] In the petition for rehearing to the court of appeals, Petitioner included an argument that M.C.L. § 500.3135(2)(a) could be viewed as substantive, rather than procedural, but Petitioner assumes for this proceeding that the conflict is procedural.

injury from impairment, noting that it is "insufficient if an important body function has been injured but not impaired." *Kreiner*, 471 Mich. at 132. Under *Kreiner*, the court decides whether "an important body function has in fact been impaired." *Id.* If so, the court decides whether the impairment is "objectively manifested" with a caveat regarding the assessment of credibility: "Subjective complaints that are not medically documented are insufficient." *Id.* The *Kreiner* method then requires the court to "engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Id.*, 471 Mich. at 132-33. The *Kreiner* court then suggested that:

> The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment 17, and (e) the prognosis for eventual recovery."

Kreiner, supra, 471 Mich. at 133. Finally, the *Kreiner* court remarked:

> We agree with the dissent that the "serious impairment of body function" inquiry must "proceed on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations." ... Whether an impairment that precludes a person from

> throwing a ninety-five miles-an-hour fastball is a "serious impairment of body function" may depend on whether the person is a professional baseball player or an accountant who likes to play catch with his son every once in a while.

Id., 471 Mich. at 134, n.19. It is evident that the serious impairment decision the court is to make "as a matter of law" under M.C.L. § 500.3135(2)(a) involves an inherently factual inquiry, which is committed to the jury under the Seventh Amendment. Given this irreconcilable conflict, the statutory provision is unconstitutional and must give way to the Seventh Amendment when such cases are tried in federal court on the basis of diversity jurisdiction. *Byrd*, supra, 356 U.S. at 537-38.

B. The Sixth Circuit formulation conflicts with the Eighth Circuit on this issue

It is noteworthy that the Sixth Circuit formulation of the conflict as involving Rule 56 appears to conflict with the analysis of the Eighth Circuit in a similar situation. *Kampa v. White Consolidated Industries, Inc.*, 115 F.3d 585 (8th Cir. 1997).

In *Kampa*, the Eighth Circuit construed a provision under a state statute, the Minnesota Human Rights Act (MHRA), that specifically provided "any action brought pursuant to this chapter shall be heard and determined by a judge sitting without a jury." *Id.*, at 586-87. Because the case involved the legal remedy of money damages, the Eighth Circuit found that "the Seventh Amendment guarantees Kampa a right to a jury trial on her MHRA claim." *Id.*, at 586.

Consequently, the case was for the jury to decide notwithstanding the statutory prohibition. *Id.*, at 587.

The question of whether the Michigan statute at issue in this case conflicts with the Seventh Amendment or with Rule 56 is important, and particularly given the conflicting analysis elsewhere, this Court should consider the issue.

II. The Sixth Circuit Erred In granting Summary Judgment under Rule 56

Fed. R. Civ. P. 56(c) permits a court to enter judgment as a matter of law "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." The court is empowered to enter judgment as a matter of law under Rule 56 only "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). All inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Id.* It is exclusively for the jury to weigh evidence and determine the credibility of witnesses. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627-29 (1944). Given the interplay of Rule 56 with the Seventh Amendment, as discussed above, it is clear that these limitations on summary judgment are intended to protect the right to a jury trial, and they "should be scrutinized with the utmost care." *Dimick*, supra, 293 U.S. at 485-86.

In this case, the court of appeals disregarded relevant medical evidence and clearly failed to construe reasonable inferences in favor of Petitioner.

The court of appeals engaged in a factual inquiry, weighing evidence and assessing the credibility of witnesses. Consequently, the court of appeals erred by granting summary judgment under Rule 56.

Once the court of appeals determined that Rule 56 controlled the case, it was required to evaluate all of the evidence in the light most favorable to Petitioner, but the court of appeals simply disregarded the medical evidence in the record. For example, the court declared that it was assuming the admissibility of Dr. Valentine's affidavit, but then dismissed it: "because Dr. Valentine does not opine on any of the ultimate factual issues of the case, it is irrelevant to our inquiry." (App. 15a, n.6). Of course, this is not the correct test for relevance. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. There is no requirement that testimony must address ultimate facts directly, and it is well established that a jury may "permit the inference of an ultimate fact from a predicate one." *Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers Compensation Programs*, 484 U.S. 135, 157-58, n.30 (1987).

In this case, Dr. Charisse Valentine expressed the opinion in her affidavit that Hannah Shropshire suffered a traumatic brain injury as a result of the accident and that the injury was "a serious neurological injury" manifesting seizures. (App. 46a-47a). Hannah's treating pediatrician, Dr. William Heath, opined that Hannah had shown normal growth and development up until her accident, and Dr. Heath ultimately expressed the opinion that "her present

difficulties with her cognitive skills and decreased school performance are the result of the head trauma she sustained in the accident." (App. 41a). Dr. Richard Weiss performed a complete battery of objective neuropsychological tests as part of his evaluation of Hannah. (App. 42a-43a). Dr. Weiss expressed the opinion in his affidavit that Hannah had suffered a closed head injury in the accident with resulting loss of mental functioning, including memory and visual-spatial deficits, as well as changes in personality and behavior. (App. 43a-44a). Dr. Weiss diagnosed Hannah with posttraumatic brain syndrome and organic personality syndrome as a result of the injuries she suffered in the accident. (App. 44a). Dr. Weiss also expressed the opinion that these conditions could "affect Hannah's ability to work, establish positive relationships with others, integrate into a productive and healthy adult life, benefit from educational endeavors, and function in a self-sufficient manner." (App. 44a).[3]

This medical evidence could support a rational jury determination that Hannah suffers from an objectively manifested impairment of an important body function that affects her general ability to lead her normal life, thereby satisfying the definition of "serious impairment of body function" under M.C.L. § 500.3135(7). Instead of considering this evidence, the court of appeals entered into a factfinding process of its own, in which it clearly weighed evidence regarding Hannah's academic performance and her

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[3] The underlying medical records, including Dr. Weiss' test results, were included in the record but are not included in the appendix to this petition in the interest of brevity.

ability to participate in certain activities. (App. 17a-18a). The court of appeals also made its own credibility determination regarding Hannah's mother, apparently expecting her to be a better source than Hannah's doctors regarding Hannah's academic limitations, and the court of appeals found Ms. Shropshire's explanation "less than compelling." (App. 18a). Rather than trying to divine expert opinions from Hannah's mother, the court of appeals should have considered the medical evidence in the record and the inferences that a jury could draw from that evidence. Even after the court of appeals determined that M.C.L. § 500.3135(2)(a) was inapplicable to this case because of the conflict with Rule 56, the court of appeals nevertheless embarked on the factual inquiry mapped out by the Michigan Supreme Court's interpretation of that statute. (App. 15a-18a).

Rule 56 should not be construed to permit judgment as a matter of law merely because a judge believes a case to be relatively weak if the evidence makes the case triable. Such a construction would undermine the Seventh Amendment's function as "an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery*, supra, 439 U.S. at 343 (Rehnquist, J., dissenting).

The court of appeals clearly erred in this case by disregarding relevant medical evidence, failing to draw appropriate inferences in favor Petitioner, weighing the evidence, and assessing the credibility of witnesses. Consequently, this Court should grant this petition in order to clarify once again the proper

method for analyzing evidence in a motion for summary judgment under Rule 56.

CONCLUSION

For the reasons set forth above, Petitioner Livonia Shropshire, as next friend of Hannah Shropshire, respectfully requests the court to grant this petition for writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-1650/1749

[Filed December 19, 2008]

LIVONIA SHROPSHIRE, individually and as next friend of HANNAH SHROPSHIRE, *Plaintiff-Appellant,*

v.

LAIDLAW TRANSIT, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 06-10682—Anna Diggs Taylor, District Judge.

Argued: October 29, 2008

Decided and Filed: December 18, 2008

Before: NORRIS, ROGERS, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Larry Bennett, GIARMARCO, MULLINS & HORTON, Troy, Michigan, for Appellant. Daniel S. Saylor, GARAN LUCOW MILLER, Detroit, Michigan, for Appellee. **ON BRIEF:** Larry Bennett, GIARMARCO, MULLINS & HORTON, Troy, Michigan, for Appellant. Daniel S. Saylor, GARAN LUCOW MILLER, Detroit, Michigan, for Appellee.

OPINION

ALAN E. NORRIS, Circuit Judge. In this personal injury action, Livonia Shropshire brought suit against defendant Laidlaw Transit, Inc., on behalf of her daughter, Hannah,[1] for injuries sustained in an automobile accident that occurred when she was five years old. Because our jurisdiction is premised on diversity of citizenship, 28 U.S.C. § 1332, we apply state substantive law. Michigan's no-fault automotive insurance scheme governs this case, and requires a plaintiff to show the existence of a "serious impairment of body [sic] function" to recover noneconomic damages. The statute further provides that, for a plaintiff such as Hannah, who alleges she suffered a closed-head injury, whether she is seriously impaired is a question for the jury if a physician testifies under oath that the plaintiff "may have a serious neurological injury." In the district court, plaintiffs sought to introduce an affidavit satisfying this provision, but the court ruled it inadmissible. Without it, plaintiffs had no evidence that Hannah had suffered a serious

---

[1] She also asserted claims related to her own alleged injuries, which are not at issue in this appeal.

impairment of body function, and the district court consequently granted summary judgment to defendant. Plaintiff appealed, and we now affirm the decision of the district court, though upon different reasoning. [2]

I.

A brief overview of Michigan's no-fault insurance scheme, Mich. Comp. Laws § 500.3135 (2008), will allow for a better understanding of the relevance of the underlying facts. Michigan has partially abolished tort liability for noneconomic damages arising out of automobile accidents. Mich. Comp. Laws §§ 500.3135(1) & (3)(b). Plaintiffs' recovery for such damages is limited to accidents in which they suffer "death, serious impairment of body function, or permanent disfigurement." Mich. Comp. Laws § 500.3135(1). At issue in the appeal before us is the "serious impairment of body function" exception, defined in the statute:

> As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that

---

[2] Defendant filed a cross-appeal and asserts that the district court erred in its analysis of proximate cause. Given our resolution of this case, we need not reach this issue. We also note in passing that a cross-appeal is inappropriate when the only relief sought is an affirmance of the district court judgment. *See generally Bailey v. Dart Container Corp.*, 292 F.3d 360, 1362 (Fed. Cir. 2002) ("It is only necessary and appropriate to file a cross-appeal when a party seeks to enlarge its own rights under the judgment.").

> affects the person's general ability to lead his or her normal life.

Mich. Comp. Laws § 500.3135(7).

The statute further instructs courts that "for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury." Mich. Comp. Laws § 500.3135(2)(a)(ii). It is this provision specifically that plaintiff invokes to avoid summary judgment and bring her case before a jury.

II.

On May 15, 2001, Hannah's mother Livonia picked her up at school, along with her two sisters and her brother. Hannah was five years old at that time, nearing the end of kindergarten. Livonia drove a van with three rows of seats and Hannah, wearing a seatbelt, sat in the row immediately behind her mother. After picking up the children Livonia headed towards the parking lot exit, driving alongside a row of school buses parked to her right. As she did so, a bus owned by defendant Laidlaw pulled away from the curb and struck the right rear passenger side of the van.

The accident caused Hannah to hit her head against the van's window. Livonia, unaware of this, quickly stopped the van and checked on her children, each of whom said he or she was okay, a message Livonia conveyed to the police when they arrived on the scene. It is undisputed that Hannah's mother did

not seek medical treatment for her the day of the accident, and Hannah never showed any physical signs of an injury from the accident.

Within a few days, however, Hannah began to experience headaches, and when, a week after the accident, she also developed a fever and began vomiting, her mother took her to see Dr. William Heath, her pediatrician. Dr. Heath found no physical evidence of an injury, but at the request of Livonia referred Hannah to a neurologist for a more complete examination. The examining neurologist, Marianne E. Majkowski, D.O., came to the same conclusion as Dr. Heath, finding no physical evidence of a head injury. Over the next five years, Hannah would visit with Dr. Majkowski and Dr. Heath numerous times, in addition to seeing three other doctors and a neuropsychologist, with the net result of one electroencephalogram(known better as an "EEG") indicating some abnormality in Hannah's brain. Otherwise, no objective test ever confirmed that Hannah suffered from a brain injury as a result of the accident. Based on the sole abnormal EEG, Dr. Charise Valentine, who performed that test, submitted an affidavit stating, in pertinent part:

> 4. That Hannah Shropshire suffered a traumatic brain injury as a result of a motor vehicle accident which occurred on the 15th day of May, 2001.
>
> 5. That Hannah Shropshire manifests seizures attributable to the aforementioned motor vehicle accident and resulting closed head injury.

> 6. As a licensed allopathic physician who regularly diagnoses and treats closed head injuries, it is my opinion that the motor vehicle accident aforementioned caused Hannah Shropshire to sustain a closed head injury resulting in a serious neurological injury.

In her deposition, Hannah testified as to what her general life has been like since the accident, and in this testimony she appears normal for a girl her age. She goes swimming, has friends at school, plays computer games and basketball, watches television with her two older sisters, rides her bike, and over the last summer "got to do all the fun stuff" that she wanted. She enjoyed third grade and her classes, but was not eager to return to school. Her mother also testified that Hannah's grades remained good throughout the years following the accident, with the exception of her handwriting grade, but that was apparently "low" before the accident as well.

In the district court, plaintiff sought to introduce Dr. Valentine's affidavit in opposition to defendant's motion for summary judgment. Plaintiff argued there, as she does here, that this affidavit satisfies subsection (2)(a)(ii) of the no-fault scheme and therefore it is now a question for the jury whether, as a result of the accident, she has a "serious impairment of body function." For various reasons that we need not address, the district court found the affidavit inadmissible, and determined that without it plaintiff had not produced evidence sufficient to satisfy subsection (2)(a)(ii). Nor, the court concluded, had plaintiff shown that her injury satisfied the generic definition of "serious impairment of body function" contained in subsection (7). Therefore, the district

court granted defendant's motion for summary judgment.

III.

We review grants of summary judgment de novo, and draw all reasonable inferences in favor of the nonmoving party. *Lockett v. Suardini*, 526 F.3d 866, 872 (6th Cir. 2008) (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

In diversity actions, we apply state substantive law but federal procedural law, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and a central dispute in this appeal concerns this substantive/procedural distinction. Mich. Comp. Laws § 500.3135(2)(a)(ii) apparently requires different things of a plaintiff at this stage of litigation than does Fed. R. Civ. P. 56(c), and this case requires us to determine whether this provision of Michigan law is substantive and therefore applicable in federal court, or procedural, in which case it is supplanted by Rule 56. We conclude that the Michigan provision at issue is procedural, and therefore a plaintiff is not entitled to argue her case to a jury merely because she has satisfied its requirements. Instead, plaintiff must produce evidence creating a genuine issue of material fact, as required by Rule 56(c). Here, plaintiff has failed to do so, and as a result defendant's motion for summary judgment must be granted.

A.

As an initial matter, Laidlaw failed to raise this issue in the district court. However, as this court has recognized, we may affirm on a ground not relied upon

by the district court. *E.g., Dismas Charities, Inc. v. United States DOJ*, 401 F3d 666, 677 (6th Cir. 2005).

Whether we apply the closed-head injury provision in federal court turns on whether that provision is substantive or procedural. *Erie R.R. Co.*, 304 U.S. at 78. For some time now, it has been clear that a substantive law is one that gives rise to "statecreated rights and obligations" or is otherwise "bound up with these rights and obligations in such a way that its application in the federal court is required." *Byrd v. Blue Ridge Rural Elec. Corp.*, 356 U.S. 525, 535 (1958). Viewed with that in mind, the subsection containing the closed-head injury provision states, in its entirety:

> (a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
>
> (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

Mich. Comp. Laws §§ 500.3135(2)(a)(i) & (ii). It appears from the language of the closed-head injury provision, and, for that matter, subsection (2)(a) as a whole, that its purpose is to allocate decision-making authority between the judge and jury, a quintessentially procedural determination. *See Byrd*, 356 U.S. at 538. This subsection sets forth no substantive standards at all; it merely delineates which decision-making body, judge or jury, should make the substantive determinations laid out elsewhere. Furthermore, because the entire subsection is bereft of substantive law, it cannot be said to be so bound up in state-created rights and obligations as to require its application in federal court.

The fact that this subsection overlaps with Rule 56, and the judge-jury demarcations set forth therein, is another indication that we should not apply it in federal court. *See Byrd*, 356 U.S. at 538 ("there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts"); *see also Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965) (holding that in diversity cases, federal courts should apply any on-point Federal Rule of Civil Procedure, unless it directly conflicts with state law and violates either the Constitution or the Rules Enabling Act, 28 U.S.C. § 2072). In *Reid v. Sears, Roebuck & Co.*, we wrote that, notwithstanding conflicting state law, "[s]ummary judgment is a procedural device for deciding a case without the necessity of a full-blown trial. When there is a motion for summary judgment in a diversity case, the provisions of Rule 56 control its determination." 790 F.2d 453, 459 (1986) (internal quotations omitted). Especially relevant here is that we have applied this rule even where the federal summary judgment

requirements displace state law that would require a jury to make a particular determination. *Bichler v. Union Bank & Trust Co.*, 745 F.2d 1006, 1014 (6th Cir. 1984) (en banc) (holding that Rule 56 applies even when a person's mental state is at issue, a question reserved for the jury under state law).

Despite subsection (2)(a)(ii)'s seemingly straightforward language, plaintiff argues that it creates a new avenue by which she can prevail on the merits, thereby making this law a substantive one that we would then apply in federal court. Her argument, however, is unavailing. We look first, as we must, to the state courts of Michigan for guidance on this question, *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005), but unfortunately, there is little to be found.[3] This is not surprising, since in Michigan state court once subsection (2)(a)(ii) is satisfied, there is nothing left for the court to decide; the case goes straight to the jury. In the absence of Michigan case law, we must anticipate how the Michigan Supreme Court would rule on the issue, and make our decision accordingly. *Id.*

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[3] There are numerous Michigan state court decisions that stand for the undisputed proposition that once a plaintiff has satisfied the requirements of the closed-head injury provision, she need not in addition satisfy the requirements of subsection (7) to survive summary disposition. *See, e.g., Nelson v. Vasich*, 2006 WL 2708683 (Mich. App. Sept. 21, 2006); *Guerrero v. Smith*, 2006 WL 2419178 (Mich. App. Aug. 22, 2006). But those cases are limited to determinations regarding summary disposition under the Michigan Court Rules; they do not in any way opine as to what the plaintiff must ultimately prove to the jury to prevail on the merits.

Turning, then, to the statute itself, a review of § 500.3135 in its entirety makes clear that there are *only* three circumstances in which a person can recover noneconomic tort damages arising from an automobile accident: "death," "permanent serious disfigurement," or "serious impairment of body function." Mich. Comp. Laws § 500.3135(1). And there is *only* one way to meet the "serious impairment" exception, as provided in subsection (7): "[a]s used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Mich. Comp. Laws § 500.3135(7). Nothing in subsection (2)(a)(ii) suggests that these requirements need not be met in order for a plaintiff to recover at trial just because a plaintiff alleges a closed head injury. In fact, by its very terms, subsection (7)'s definition applies to the entire "section," including subsection (2)(a)(ii).

The jury instructions Michigan courts use in such cases support our conclusion that subsection (2)(a)(ii) does not provide a new means of recovery. In any case arising under the no-fault statute, courts instruct the jury that:

> One of the elements plaintiff must prove in order to recover noneconomic loss damages in this case is that [he/she] sustained a serious impairment of body function.
>
> Serious impairment of body function means an objectively manifested impairment of an important body function that affects the plaintiff's general ability to lead [his/her] normal life.

M. Civ. JI 36.11. These instructions are "To Be Used in Cases in Which [Mich. Comp. Laws § 500.3135] Applies," and there is no exception or different instruction to be given for cases that go to a jury under the closed-head injury provision.[4] *Id.* In other words, even when "a question of fact for the jury is created" by way of the closed-head injury provision, juries are still instructed that they may only find for the plaintiff if her injury meets the requirements of subsection (7). No Michigan court has ever held or even hinted to the contrary, and we have no reason to believe that, given the opportunity, they would do so.

We conclude, then, that although subsection (2)(a)(ii) provides an alternate road by which a plaintiff may reach a jury, it does not create an altogether new means of recovery. In Michigan, there is but one route to ultimate recovery for plaintiffs with closed-head injuries arising from an automobile accident, and that is through subsection (1) via the requirements laid out in subsection (7).

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[4] The "Notes on Use" do not provide any instruction to the contrary. They state only that:

> The amended statute specifically provides that for a closed-head injury, a question of fact is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treat closed-head injuries testifies under oath that there may be a serious neurological injury. MCL 500.3135(2).

M. Civ. J1 36.11. There is no indication anywhere in the instructions that the generic instruction quoted above is not to be given in such cases.

Finally, plaintiff took the position at oral argument that the closed-head injury provision is substantive because it is found in a state statute that creates a cause of action. Put another way, plaintiff contends that Rule 56 may only supplant provisions of state law that are found in the state's summary judgment procedures, and in this she is simply mistaken. Whether a state law provision is substantive or procedural depends not on where that law is found, but rather, as stated above, on whether that particular provision either creates rights and obligations or is so "bound up with [state-created] rights and obligations" that it must be considered substantive. *Byrd*, 356 U.S. at 535. It is true that in the usual case, the state law overridden by Rule 56 will be the state's summary judgment rule, but that is happenstance, not a limit on the application of federal summary judgment procedures. *See, e.g., Central Ins. Co. v. Dana Corp*, 1990 WL 47561 (6th Cir. Apr. 17, 1990) (holding that Rule 56 overrides state case law preventing summary judgment disposition for cases involving claims for piercing the corporate veil).

In drawing the conclusion we reach today, we recognize that because Rule 56 and section (2)(a)(ii) set forth different standards for plaintiffs at this stage of litigation,[5] it is inevitable that our decision to apply

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[5] As plaintiff points out, in Michigan it is settled law that a plaintiff who has produced evidence satisfying this provision is entitled to argue her case to a jury; she need not adduce any other evidence to avoid summary disposition. *See, e.g., McCall v. Dorch*, 2007 2007 WL 171987 (Mich. App. Jan. 23, 2007). Laidlaw agrees, and concedes that if Dr. Valentine's affidavit is admissible, then defendant's motion for summary disposition would be denied in the Michigan courts. Federal law, on the other hand, requires a

the federal rule over the state statute will, on occasion, lead to different outcomes. But this is no barrier to the application of the federal standard, given the "strong federal policy" of not permitting state law to interfere with the "judge-jury relationship in the federal courts." *Byrd*, 356 U.S. at 538; *accord Reid*, 790 F.2d at 459. Moreover, this difference in outcome should be exceedingly rare. The evidence we require of a plaintiff to survive summary judgment is by definition some lesser quantum of the same evidence she would eventually have to produce if she were to prevail at trial. If she cannot produce the minimal evidence required to survive summary judgment, there is no reason to think she would have prevailed at trial. Therefore, we are not overly concerned that our decision today will lead to different outcomes in federal as opposed to state court.

B.

Having determined that defendant's motion for summary judgment is governed by Rule 56, we are left with the task of applying that rule to the case at bar. Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon a defendant's motion for summary judgment, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be

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court to adjudge motions for summary judgment based on the familiar standard of whether there exists a genuine issue of material fact. Fed. R. Civ. P. 56(c).

evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). We must, therefore, determine whether plaintiff has created a genuine issue of material fact on the essential elements of her case.[6] Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

According to the Michigan Supreme Court, "'serious impairment of body function' contains the following components: an objectively manifested impairment, of an important body function, and that affects the person's general ability to lead his or her normal life."[7] Kreiner v. Fischer, 683 N.W.2d 611, 619 (Mich. 2004) (footnote omitted). Because we conclude plaintiff has not satisfied the last element, we need not address the first two.

The *Kreiner* court explained in great detail how courts should determine whether an injury affects a person's general ability to lead her life, beginning by noting that:

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[6] We assume without deciding that Dr. Valentine's affidavit is admissible evidence, and as such, it will be treated like all other evidence submitted at this stage of litigation. However, because Dr. Valentine does not opine on any of the ultimate factual issues of the case, it is irrelevant to our inquiry.

[7] We note that the *Kreiner* court set forth this analysis to guide courts when applying the other two provisions of subsection (2)(a), that is, to courts determining as a matter of law whether an injury rose to the level of being a serious impairment of bodily function, under subsection (2)(a)(i) or the first sentence of subsection (2)(a)(ii). 683 N.W.2d at 625. However, we see no reason why its logic would not apply here, because *Kreiner* expands and interprets subsection (7), the requirements of which plaintiff must meet to prevail, as discussed above.

> [W]hat is "normal" is to be determined subjectively on the basis of the plaintiff's own life and not the life of some objective third party. However, once that is fixed as the base, it is to be objectively determined whether the impairment in fact affects the plaintiff's "general ability to lead" that life.

Id. at 619 n.7. The court further clarified the analysis to be undertaken:

> The starting point in analyzing whether an impairment affects a person's "general," i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity.

Id. at 625. In general, courts should make this determination based on the totality of the circumstances.[8] *Id.* at 626.

Hannah's youth at the time of the accident – she was five years old and had just finished kindergarten

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[8] A non-exclusive list of factors to be considered include "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id.* at 626.

makes it difficult to apply *Kreiner* to her case.[9] Nonetheless, we begin by noting those things which have *not* been affected by Hannah's alleged injury: Hannah has, by her mother's account, missed only two weeks of school due to this accident, largely for visits to the doctor, so her injury cannot be said to have affected her ability to attend school. Nor has her injury, or the alleged seizures that come along with it, affected her ability to participate in activities or interact with other students and friends – she enjoys doing many things typical for a girl her age, such as playing basketball, riding her bike, and playing with her best friend (who has been so since the first grade).

This leaves plaintiff with the argument that her general ability to lead her normal life has been affected through the accident's effect on her academic performance. This is a significant activity in a young person's life, the importance of which we do not doubt. Defendant Laidlaw points out that Hannah has never been held back a grade in school, nor has she ever needed or received the assistance of a tutor, or a special teacher of any kind to help her with her school work. To be sure, there is more to academic performance than that – just because a student does not fail or need a tutor does not mean that her ability to perform academically has not been affected substantially enough to change her ability to lead her normal life. But Hannah's mother had an opportunity to explain exactly how the injury has affected her

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[9] Adding to this difficulty is the fact that plaintiff has not at any point even attempted to identify any evidence suggesting that she can ultimately prevail, instead hanging her hat on her argument that she need not satisfy the requirements of Rule 56 to survive summary judgment.

daughter's academic performance, and her explanation was, in our view, less than compelling. When asked if Hannah had experienced any problems at school during first grade, the year after the accident, the only problem she brought up was with her handwriting. She maintained this even when pressed as to whether there was "anything else besides her handwriting" that was giving Hannah problems, and she eventually stated that otherwise, Hannah's grades were good. What's more, when putting Hannah's low first-grade handwriting grade in perspective, she went on to testify that Hannah had also received a low handwriting score in kindergarten. This is the only evidence we have on this issue, and it is insufficient to create a genuine issue of material fact.

IV.

For these reasons we **affirm** the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-1650/1749

[Filed December 19, 2008]

LIVONIA SHROPSHIRE, individually and as next friend of HANNAH SHROPSHIRE, Plaintiff-Appellant,	)
v.	)
LAIDLAW TRANSIT, INC., Defendant-Appellee.	)

Before: NORRIS, ROGERS, and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 06-10682

[Dated March 5, 2007]

LIVONIA SHROPSHIRE, Individually and as Next Friend of H.S., a Minor, and H.S., a minor,

Plaintiffs,

v.

LAIDLAW TRANSIT, INCORPORATED,

Defendant.

MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE
ANNA DIGGS TAYLOR
United States District Judge
602 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard West
Detroit, Michigan
Monday, March 5, 2007

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– – –

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EXHIBITS

Exhibit No.	**Offered**	**Received**

(None Offered)

* * *

[p.17] MR. SHREVE: That's no serious impairment.

THE COURT: All right. There we go. Go ahead.

MR. SHREVE: As the Court is well aware, there is no cause of action in Michigan under MCL 500.3135, and **Kreiner versus Fischer,** where Plaintiff's injuries do not meet the no fault threshold. If the injuries are not a serious impairment of a body function based upon objectively manifested injury of an

important body function affecting the general ability to lead and conduct one's normal course of life, such as a medically identifiable, medically documented objective verification of injuries, then the case cannot go forward.

In this case -- in the present case, it simply does not exist as to Hannah. Again, we have a very minor fender-bender accident. Not one other child in the car had so much as an injury. Hannah has not manifested any physical injuries at the time. Not even a bump on the head. Not even a scrape.

Dr. Heath, in his medical visits, or seeing her even seven days after the accident -- because she didn't go to an emergency room, had no emergent treatment -- found no diagnosis of a traumatic brain [p.18] injury. Dr. Heath found no brain injuries at all relating to this accident. No treatment by Dr. Heath. Finds her normal. No physical impairments. No restrictions in activities of daily living. No serious conditions related to this minor accident, and says very clearly, no serious neurological injury.

First visit and complaints are consistent, because of the arguments of some vomiting and headaches with her preaccident medical condition where she went to the hospital a week or two before for flu-like symptoms before this accident. Therefore, it is undisputed, that under MCL 500.35, that Plaintiff Hannah has not sustained a serious impairment of a body function, as a matter of law, based upon the **Kreiner** case.

Plaintiffs attempt -- and they don't even dispute that she doesn't -- that she meets -- excuse me, that she can get by that criteria. Instead, they argue that

under (2)(a)(ii) that, because they have now presented a conclusionary affidavit, that they get around the No Fault Act limitations because somebody says, such as Dr. Valentine, she had a serious neurological injury, without anything more or any factual support for that. Thus Plaintiff's entire case is trying to fit the proverbial square peg into [p.19] the round hole.

Plaintiff's entire position is based on this exception that -- in an effort to try and circumvent summary judgment in this case. To circumvent this case, you need sworn deposition -- or there has to be sworn deposition testimony, where we have sworn deposition testimony that doesn't support Plaintiff's position. So what Plaintiffs have done is got contrary affidavits. And as this Court is well aware, you cannot contradict sworn testimony with affidavits to try and circumvent and create questions of fact, and that is very clear both in Michigan and federal law.

Also, under (2)(a)(ii), it requires a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injury cases, that there may be a serious neurological injury. The first person I wish to point to is this Dr. Weiss, a neuropsychologist, who is neither an osteopathic or an allopathic physician. He was hired by Plaintiff's counsel. He spends most of his time, better than 95 percent, as an expert witness in litigation matters. He can't support their position as a matter of law.

Next, Dr. Heath clearly testified that he [p.20] does not diagnose or treat head injury cases. So therefore, that individual is unable to meet the requirements of this statute.

Lastly, Plaintiff's entire position is based upon Dr. Valentine's conclusionary affidavit. In Dr. Valentine's testimony, she indicates that less than ten percent of her work is closed-head injury work or traumatic brain injury work. Page 5 of her deposition. They try and point to that Hannah Shropshire at one point had a slightly abnormal EEG, when prior to this time, with the neurologist originally sent to by Dr. Heath, the EEG was fully normal.

And thereafter, Livonia Shropshire chose to change physicians and find Dr. Valentine. So well over a year, I think it was a year and a half after this accident, we have this minor abnormality, and Dr. Valentine cannot say that it is posttraumatic. Page 26 and 27 of her deposition. She provides no testimony claiming that this injury or her findings are related as a traumatic brain injury, and has no supporting evidence that it's related in any way to this accident whatsoever.

So where is the support that they have, other than this strictly conclusionary affidavit, [p.21] which as indicated, is contrary to law under FRCP 56(e), which says that when you're going to present an affidavit, there has to be admissible factual support for it. It has to be done with personal knowledge of the accident or injury. As the Sixth Circuit indicated in **Williams versus Ford Motor Company,** you cannot rely on an ultimate expert conclusion as a free pass to trial.

Again, they must come forward with a sin -- more than a scintilla of evidence in this case, and a conclusionary affidavit that violates FRCP 56(e), that violates the Sixth Circuit rules on affidavits, does not create the exception to the requirement of showing a serious impairment of an important body function.

Basically, Plaintiff's position fails completely, and we believe summary judgment is appropriate.

THE COURT: Thank you.

MR. SHREVE: Does the Court have any questions?

THE COURT: Response -- no, no questions. You'll have rebuttal.

MR. MALLON: Thank you, your Honor. Just a very brief response. MCLA Section 500.3135(2)(a)(ii) states that for a closed-head injury, a question of fact for the jury is created if a licensed allopathic [p.22] or osteopathic physician, who regularly diagnoses or treats closed head injuries, testifies under oath that there may be a serious neurological injury.

Dr. Valentine --

THE COURT: A physician who regularly diagnoses or treats?

MR. MALLON: Correct. Dr. Valentine states in her affidavit that she is an allopathic physician licensed in the state of Michigan, and is a practicing neurologist, that Hannah Shropshire is and has been for over a year a patient.

She states *I regularly treat children with traumatic brain injuries;* that *Hannah Shropshire suffered a traumatic brain injury as a result of a motor vehicle accident which occurred on the 15th day of May, 2001;* that *Hannah Shropshire manifests seizures attributable to the aforementioned motor vehicle accident and resulting closed-head injury.*

As a licensed allopathic physician who regularly diagnoses and treats closed-head injuries, it is my opinion that the motor vehicle accident aforementioned caused Hannah Shropshire to sustain a closed-head injury resulting in a serious neurological injury.

And I would respectfully indicate to the [p.23] Court that that's all fours within the statute.

THE COURT: Thank you.

MR. MALLON: Thank you, your Honor.

THE COURT: Any rebuttal?

MR. SHREVE: Yes, your Honor. As indicated on Page 5 of her deposition, she said that only ten percent of her business or her work even deals with traumatic brain injury. So does she do it regularly? No.

Further, keep in mind that what Plaintiff has read to you was an affidavit that contradicts her sworn testimony. And it's very clear under **Peck versus Bridgeport Machines,** Sixth Circuit decision, that you cannot use affidavits to contradict sworn testimony. Sworn testimony under cross examination is what the Court must look at. You cannot create questions of fact by using that methodology.

Dr. Valentine testified that she has no records that support this conclusion of an accident-related traumatic brain injury. In fact, she never even got, that's her own admission, that all of the information came from her mother. She hasn't been given deposition testimony. She hasn't been given any other

medical records, and that's what she said in her deposition.

[p.24] So how can they come back with an affidavit that contradicts, where she says that -- for example, on Page 16, *it must be a significant impact to cause a closed-head injury.* She has no evidence of that. She hasn't even been given any evidence of that. In fact, there is no evidence of that. She says that she has *no information to support this.* She only makes assumptions on Page 17. As indicated, she has no research to support any of the conclusions in this affidavit that they came with later.

And she was even -- she even says on Page 40 *there was no abnormalities in her physical examination.* Again, on Page 49 and Page 75, *no evidence presented of Hannah Shropshire hitting her head,* in the testimony of Dr. Valentine. And she says on Page 89 she *can't say even these EEG tests are even related to this accident.*

So can you come forward, in violation of Sixth Circuit rules, and try and create this question under sub part (2)(a)(ii) by way of a contradictory and conclusionary affidavit in violation of Rule 56(e) is improper, and the Court can not rely on that but must rely on the sworn testimony which doesn't support the position. We'd ask that the motion be granted, your Honor.

[p.25] THE COURT: It does appear that the Court must grant the motion for summary judgment that Defendant has made on no serious impairment of bodily function on the part of Hannah Shropshire.

First of all, there has been no showing, there's been no suggestion of an impairment of her ability to lead her normal life. The Plaintiff's alleged impairment has also not been objectively manifested, because to date, the majority of her tests have come back normal. The testimony of her mother and others indicates that the Plaintiff has continued to live relatively as she lived prior to the accident.

And the doctor, Dr. Valentine, does contradict in her affidavit the sworn testimony that she gave at her deposition. That is, she says in the affidavit that *Hannah Shropshire manifests seizures attributable to the aforementioned motor vehicle accident and resulting closed-head injury.* But she said if the question is -- at her sworn deposition testimony, *if the question is did somebody tell me that she had an event that was a definite clinical seizure, the answer to that is no.* So Dr. Valentine has attempted to contradict her sworn deposition testimony with an affidavit.

So for all of those reasons the Court has to [p.26] grant the motion for summary judgment against Hannah Shropshire.

Now, you have one about Livonia Shropshire?

MR. DAVIS: Hi. I'm Alan Davis. I'm also appearing on behalf of the Defendant.

THE COURT: Good afternoon.

MR. DAVIS: Yes, your Honor. With regard to Livonia, you've already addressed some of the serious impairment issues. We get by the whether or not she had an objective manifestation. Mrs. Shropshire's

claiming that her left arm has been injured by this, and there was an EMG that I guess technically would show something, and so we're not arguing that issue of the objective manifestation. And whether or not the left arm is an important body function, we're not arguing that in our motion.

But the third element that you must show is that it affects the person's general ability to lead his or her normal life. As we cited in our brief, the primary case on this matter is **Kreiner versus Fischer,** which was the Michigan Supreme Court's pronouncement and examination of the statute as it was amended in 1995 to increase the threshold level that's required.

The important parts of **Kreiner** is two important things to be recalled. One is that the

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-cv-10682

[Filed March 22, 2007]

LIVONIA SHROPSHIRE, individually and as Next Friend of HANNAH SHROPSHIRE, a minor,
Plaintiffs,

v.

LAIDLAW TRANSIT, INC., a foreign corporation,
Defendant.

Hon. Anna Diggs Taylor

Mag. Judge Virginia Morgan

JEFFREY M. MALLON (P17025)
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ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO NO PROXIMATE CAUSATION, ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO LIVONIA SHROPSHIRE, AS NEXT FRIEND OF HANNAH SHROPSHIRE AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO LIVONIA SHROPSHIRE

This matter having come on for hearing, on March 5, 2007, before this Honorable Court pursuant to Defendant's Motion for Summary Judgment as to No Serious Impairment of Body Function as to Hannah Shropshire, only, Defendant's Motion for Summary Judgment as to No Proximate Causation Between Hannah's Claims of Traumatic Brain Injury and the Motor Vehicle Accident, and Defendant's Motion for Summary Judgment as to Livonia Shropshire, and this Court having reviewed the Briefs, having heard oral argument, and being otherwise fully advised in the premises;

1. **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment as to No Proximate Causation Between Hannah Claims of Traumatic Brain Injury and the Motor Vehicle Accident [Doc. #14] is DENIED for the reason set forth by the Court on the record.

2. **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment as to No Serious Impairment of Body Function as to Hannah Shropshire Only [Doc. #16] is GRANTED for the reason set forth by the Court on the record.

3. **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment as to Livonia Shropshire Only [Doc. #15] is GRANTED for the reason set forth by the Court on the record.

4. **IT IS FURTHER ORDERED** that there are no further matters before this Court and that this would be the final Order in this case.

DATED: March 22, 2007

/s/
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on March 22, 2007.

s/ Johnetta M. Curry-Williams
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-10682

[Filed May 7, 2007]

LIVONIA SHROPSHIRE, individually and as Next Friend of HANNAH SHROPSHIRE, a minor,
Plaintiffs,

v.

LAIDLAW TRANSIT, INC., a foreign corporation,
Defendant.

Hon. Anna Diggs Taylor

ORDER DENYING MOTION FOR RECONSIDERATION

On October 23, 2006, Defendant filed a Motion for Summary Judgment as to No Serious Impairment of Body Function as to Hannah Shropshire, only. On March 5, 2007, after hearing oral arguments, this Court granted Defendant's motion. On March 22, 2007, an Order was entered granting Defendant's motion.

On March 29, 2007, Plaintiff filed the motion for reconsideration which is now before the Court.

The issues before the Court on this motion are whether Plaintiff made a showing: (i) of a reason justifying relief from this Court's judgment, and (ii) of a palpable defect by which the court was misled, and that correction of the defect will result in a different disposition of the case. See E.D. Mich. L.R. 7.1(g)(3); FRCP 60.

Pursuant to Federal Rule of Civil Procedure 60, on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for: (i) mistake, inadvertence, surprise or excusable neglect, (ii) newly discovered evidence, (iii) fraud, (iv) the judgment is void, (v) the judgment has been satisfied or (vi) any other reason justifying relief." See FRCP 60. Pursuant to Local Rule 7.1 (g)(3), "[g]enerally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1 (g)(2)-(3).

Plaintiff clearly raises arguments which were previously considered and ruled upon by this Court. Accordingly, Plaintiff has failed to show a reason justifying relief from operation of the judgment or a palpable defect by which the court was misled. See FRCP 60; E.D. Mich. L.R. 7.1(g)(3).

Therefore, Plaintiffs' motion pursuant to Rule 7.1 (g) of the Local Rules asking the Court to reconsider its Order granting Defendant's Motion for Summary Judgment as to No Serious Impairment of Body Function as to Hannah Shropshire is hereby DENIED.

IT IS SO ORDERED.

/s/
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT COURT

Dated: MAY 7, 2007

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on 5-7-2007.

Johnetta M. Curry-Williams
Case Manager

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-1650/1749

[Filed February 25, 2009]

LIVONIA SHROPSHIRE, INDIVIDUALLY AND AS NEXT FRIEND OF HANNAH SHROPSHIRE,
Plaintiff-Appellant/Cross-Appellee,

v.

LAIDLAW TRANSIT, INC.,
Defendant-Appellee/Cross-Appellant.

Before: NORRIS, ROGERS, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX F

EXHIBIT H
SWORN AFFIDAVIT OF DR. WILLIAM HEATH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. : 06-cv-10682
Hon. Anna Diggs Taylor
Mag. Judge Virginia Morgan

LIVONIA SHROPSHIRE, Individually and as Next Friend of HANNAH SHROPSHIRE, a minor,

Plaintiffs,

vs.

LAIDLAW TRANSIT, INC., a foreign corporation,

Defendant.

JEFFREY M. MALLON (P17025)
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(248) 258-5747

MARK SHREVE (P29149)
ALAN G. DAVIS (P27830)
Garan Lucow Miller, P.C.
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(248) 641-7600

AFFIDAVIT OF WILLIAM D. HEATH, M.D.

STATE OF MICHIGAN)
) SS:
COUNTY OF WAYNE)

Now comes your Affiant, William D. Heath, M. D., having been first duly sworn states as follows:

1. Hannah Shropshire is now a twelve-year old child with a history of having been in a motor vehicle accident that occurred on May 15, 2001, when she was five years old. Hannah was reported to have experienced a brief period of unresponsiveness after the accident, this was followed by a period of being dazed. I examined Hannah on May 22, 2001 and at that time she complained of severe headaches. At this time I ordered a CT scan of her brain and referred her to Dr. Valentine for a complete neurological evaluation.

2. Over the next several months Hannah's mother noticed changes in her emotional and cognitive skills. Her headaches persisted and were accompanied by a deterioration in her handwriting and academic performance in school. I discussed these concerns with Mrs. Shropshire.

3. I have been Hannah's pediatrician since her birth and over the years she came in for regular well child visits as well as illnesses. After reviewing her medical record, I find that Hannah showed normal growth and development up until her accident. It is my opinion that her present difficulties with her cognitive skills and decreased school performance are the result of the head trauma she sustained in the automobile accident.

4. I am in complete agreement that Hannah should be provided a special educational environment to help with her present learning disabilities.

Further, Deponent sayeth not.

/s/ William C. Heath, M.D.
WILLIAM C. HEATH, M.D.

Subscribed and sworn to before me this
9th day of November, 2006.

/s/ Cynthia E. Mallon
Notary Public

[seal]

APPENDIX G

EXHIBIT J
SWORN AFFIDAVIT OF RICHARD WEISS Ph.D.

Forest Park Clinic
34899 W. 12 Mile Rd., Ste. 310
Farmington Hills, MI 48331
Phone: 248-489-3030 Fax: 248-489-3731

Re: Hannah Shropshire
DOB: November 25, 1995

Dr. Weiss, having been duly sworn, says:

1. He is a licensed psychologist (Michigan License 001687) who, as part of his practice, regularly diagnoses and treats individuals who have sustained closed head injuries.

2. He evaluated Hannah Shropshire in October and November of 2004 for injuries pertaining to a motor vehicle accident that occurred on May 15, 2001. His examination consisted of a clnical interview, an interview with Hannah's mother, and the administration of the following tests: Weschler Intelligence Scale for Children – Third Revision, Wide Range Assessment of Memory and Learning, Wide Range Achievement Test – Revision 3, Luria Nebraska Neurospychological Battery for Children – Children's revision, Children's Category Test, California Verbal

Learning Test – Children's Revision, The Gordon Assessment System, and the Personality Inventory for Children. He also reviewed medical records from Children's Hospital and Dr. Valentine as well as a neuropsychological examination conducted by Dr. Rothermel in 2003.

3. It is his opinion that as a consequence of the 5-15-2001 motor vehicle accident Hannah suffered a serious impairment of body function in the form of a closed head injury, this resulting in loss of mental functioning, (including memory deficits and visual-spatial deficits), as well as changes in personality and behavior (including impulsivity and distractibility).

4. He diagnosed Ms. Shropshire with posttraumatic brain syndrome and organic personality syndrome, providing an impression that these conditions are the consequence of the 5-21-01 motor vehicle accident.

5. It is his opinion that because of the effects of the 5-21-01 motor vehicle accident Hannah is at increased risk for problems in her later life that would affect her ability to work, establish positive relationships with others, integrate into a productive and healthy adult life, benefit from educational endeavors, and function in a self-sufficient manner.

6. It is his opinion that Hannah requires therapeutic interventions for the effects of her

closed head injury, including treatment for cognitive deficits and behavioral changes.

7. From a neuropsychological perspective, the effects of Hannah Shropshire's injuries are objectively manifested and are affecting her ability to generally lead her normal life.

/s/ Richard L. Weiss
Dr. Richard L. Weiss, Affiant
Licensed Psychologist

Subscribed and sworn before me
This 15 day of November, 2006.

/s/_____, Notary Public
Oakland, Michigan

My commission expires: 9/27/08

[seal]

APPENDIX H

EXHIBIT B
SWORN AFFIDAVIT OF
DR. CHARISE VALENTINE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Case No. 04-403935-NI
Hon. Susan Borman

LIVONIA SHROPSHIRE, INDIVIDUALLY AND AS NEXT FRIEND OF HANNAH SHROPSHIRE, MINOR,

Plaintiffs,

vs.

SHANA BYNUM and LAIDLAW TRANSIT, INC., A FOREIGN CORPORATION and CLARENCE BLACK and CHERRY HILL SCHOOL OF THE PERFORMING ARTS, A MICHIGAN NONPROFIT CORPORATION, JOINTLY AND SEVERALLY,

Defendants.

JEFFREY M. MALLON (P17025)
Attorney for Plaintiffs
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BLANCO MILLER, P.C.
ORLANDO L. BLANCO (P34480)
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Attorneys for Defendants
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Troy, MI 48084
(248) 519-9000

AN AFFIDAVIT OF ALLOPATHIC NEUROLOGIST DR. CHARISSE VALENTINE

NOW COMES your Affiant, Dr. Charisse Valentine, and, having been first duly sworn, states:

1. That she is an allopathic physician licensed in the state of Michigan and is a practicing neurologist.

2. That Hannah Shropshire is and has been for over a year, a patient.

3. I regularly treat children with traumatic brain injuries.

4. That Hannah Shropshire suffered a traumatic brain injury as a result of a motor vehicle accident which occurred on the 15th day of May, 2001.

5. That Hannah Shropshire manifests seizures attributable to the aforementioned motor vehicle accident and resulting closed head injury.

6. As a licensed allopathic physician who regularly diagnoses and treats closed head injuries, it is my opinion that the motor vehicle accident aforementioned caused Hannah Shropshire to sustain a closed head injury resulting in a serious neurological injury.

/s/ Charise Valentine
DR. CHARISSE VALENTINE

Dated: 4/18/05

Subscribed and sworn to before me
this 18th day of April, 2005
in OAKLAND County, Michigan.

/s/ Debra M. Ridley
NOTARY PUBLIC

WAYNE COUNTY, MICHIGAN
ACTING IN OAKLAND COUNTY
My Commission Expires: 11-16-2005

[seal]